It is also held in the case under comment that the complaint is insufficient in that it "fails to state any kind of a cause of action upon any possible theory." The complaint had been drawn on the theory that under the 1907 act adverse claims to water could be adjudicated without a showing of actual conflict or wrongful diversion. The court distinguishes between an action of this kind and "one to determine adverse claims of title to real estate." The better and general rule seems to be that the assertion of an adverse claim is sufficient and actual interference need not be pleaded.[9]

A. E. C.

WILLS: CHARITABLE GIFTS: PRECATORY AND SECRET TRUSTS.—Those who desire to leave more than one-third of their property for charitable purposes in spite of the prohibitions of section 1313 of the Civil Code, will doubtless welcome the recent assurance from the Supreme Court of California[1] that a legacy or devise with a recommendation to the donee to dispose of the subject matter of the gift to charities does not come within the terms of the above mentioned section. From the standpoint of both English and American authorities, it seems to be well established that a precatory or recommendatory disposition may be made which will be perfectly valid notwithstanding the restrictions of the various statutes of a mortmain character. In the case referred to the testatrix had stated in her will that she desired, and was fully confident, that the legatee would use the property for charitable purposes in accordance with her wishes, but had also expressly provided that she imposed no trust or limitation in respect to the legacy. Although in the earlier cases slight expressions were held sufficient to create a trust, the more recent authorities stand for the rule, followed in the principal case, that the disposition will not be deemed by way of trust unless upon a reasonable construction of the entire will it is evident that the testator intended to make a binding and imperative direction upon the legatee.[2] It is immaterial that the purpose of this recommendatory form of gift is to avoid the prohibitions of a mortmain statute.[3] Since no legal or equitable obligation rests

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[9] 1 Wiel, Water Rights in the Western States, 729; 3 Kinney Irrigation and Water Rights, 2764.

[1] Estate of Purcell, (Jan. 26, 1914) 47 Cal. Dec. 210.

[2] In re Diggles, (1886) L. R. 39 Ch. Div.. 253; In re Oldfield, (1904) 1 Ch. 549; In re Whitcomb, (1890) 86 Cal. 265, 24 Pac. 1028; Estate of Marti, (1901) 132 Cal. 666, 61 Pac. 964; Kauffman v. Gries, (1903) 141 Cal. 295, 74 Pac. 846; Estate of Mitchell, (1911) 160 Cal. 618, 117 Pac. 774.

[3] O'Donnell v. Murphy, (1911) 17 Cal. App. 625, 120 Pac. 1076; Fairchild v. Edson, (1897) 154 N. Y. 199, 48 N. E. 541; Lomax v. Ripley, (1855) 3 Sm. & Giff. 48; Carter v. Green, (1857) 3 K. & J. 591.

upon the legatee to dispose of the property for charitable purposes, no question of the violation of a mortmain statute can be involved.

Undoubtedly, a factor more subtly dangerous in wrecking testators' intentions to avoid mortmain statutes, than the mere matter of wording a precatory clause, is the possibility of the creation of a secret trust. From the donee's promise, express or implied, to apply the property to a certain purpose, a constructive trust, or trust ex maleficio, will arise. Ordinarily, the beneficiaries under this constructive trust would be those secretly designated by the testator.[4] But where mortmain prohibitions are involved a different result obtains. In such a case the donee holds as constructive trustee, not for the secret beneficiary, the charity, but for the residuary devisees or legatees under the will, or for the heirs or next of kin.[5] Mere silence on the part of the donee, with knowledge during the lifetime of the testator that the latter intended that the gift should actually be applied for charitable purposes, is sufficient to create this constructive trust.[6] If the testator discloses to the donee the precatory nature of the disposition, the fact of such communication, in the absence of any evidence to the contrary, would seem to be sufficient to imply a request on the part of the testator and an answering promise by reason of the silence of the donee. Certainly, knowledge of any kind on the part of the donee opens the way for a secret trust on the basis of an implied understanding or "gentlemen's agreement" to be proved to the satisfaction of a court.

At best, a recommendatory form of disposition is an unsatisfactory way of avoiding the mortmain statutes. The risk of abuse of confidence by the donee is always present. As has been mentioned, there is a chance of knowledge on his part, from which a secret trust may arise. Again, there is the possibility of the lunacy, insolvency, or sudden death of the donee before he has had an opportunity to carry out the testator's wishes. In practice, this latter contingency is often sought to be avoided by making the gift to several persons as joint tenants. But even that device is not free from risk, for there is the problem of finding several in whom implicit confidence may safely be imposed. And where

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[4] De Laurencel v. De Boom, (1874) 48 Cal. 581; Curdy v. Berton, (1889) 79 Cal. 420, 21 Pac. 858, 5 L. R. 189; Winder v. Scholey, (1910) 83 Ohio St. 204, 93 N. E. 1098, 33 L. R. A. (N. S.) 995, and case note.

[5] Jones v. Badley, (1866) L. R. 3 Eq. 635, L. R. 3 Ch. App. C. 362; Moss v. Cooper, (1861) 1 J. & H. 352; O'Hara v. Dudley, (1884) 95 N. Y. 403; Amherst College v. Ritch, (1896) 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; Fairchild v. Edson, (1897) 154 N. Y. 199, 48 N. E. 541.

[6] Wallgrave v. Tebbs, (1855) 2 K. & J 313, 321; Tee v. Ferris, (1856) 2 K. & J. 357, 364; Rowbotham v. Dunnett, (1878) L. R. 8 Ch. Div. 430.

the gift is to joint tenants, knowledge and the consequent constructive trusteeship on the part of one joint tenant is, in the contemplation of the law, attributable in the same manner to all,[7] —a decided drawback.

As to the expediency of the provisions of section 1313 of our Civil Code, and of other similar statutes of a mortmain character, opinions may well differ. If these statutes are inexpedient, let them be repealed. But so long as they exist, is it a cause for regret that they cannot be evaded with complete assurance?

W. W. F., Jr.

WILLS: COMPETENCY OF A WITNESS WHOSE HUSBAND IS A BENEFICIARY UNDER THE WILL.—The statute of Colorado expressly declares a bequest to a subscribing witness void, unless the will is attested by a sufficient number of other competent witnesses. A testator bequeathed parts of his estate to the husband of one of the two attesting witnesses of his will. The court held not only that the will was validly executed, but that the husband's legacy was good.[1]

In the earlier cases the notion that husband and wife were "one in legal intendment" and the strict application of the interest rule made the result reached in the principal case impossible. In some jurisdictions, the entire will was held void, because the husband or wife of a beneficiary was considered an incompetent attesting witness.[2] Other courts said that the legacy to the husband or wife of the attesting witness was void and so the witness was competent, since the objectionable element of interest had been removed.[3] The authorities are still divided; but the holding of the principal case is in accord with the tendency of recent decisions.[4]

Under the present statutes of Colorado or California,[5] whether the wife or husband shall testify "for or against" the other spouse, depends upon the other's consent. It is consequently within the power of the spouse who is the beneficiary under

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[7] O'Hara v. Dudley, (1884) 95 N. Y. 403, 413; Fairchild v. Edson, (1897) 154 N. Y. 199, 221, 48 N. E. 541. In re Stead, (1900) 1 Ch. 237, holds that one joint tenant is affected by the promise of another joint tenant when the gift is made in reliance on a prior promise, but not when, as a result of a promise made subsequently to the execution of the will, the gift remains unrevoked. For a criticism of this distinction, see 13 Harvard L. Rev. 520.

[1] White v. Bower, (Dec. 1, 1913) 136 Pac. 1053 (Col.)

[2] Sullivan v. Sullivan, (1871) 106 Mass. 474, 8 Am. Rep. 356; Fish v. Spence, (1894) 150 Ill. 253; 37 N. E. 314. 41 Am. St. Rep. 360 Notes in 8 Harvard Law Review 181 and 7 Harv. Law Rev. 500.

[3] Jackson v. Wood, (1799) 1 Johns Cases, (N. Y.) 163; Winslow v. Kimball, (1846) 25 Me. 493.

[4] 40 Cyc. 1062, 1112; 18 Harv. Law Rev. 474.

[5] Code of Civil Procedure, sec. 1881.